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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 173

IDA PHILLIPS,

Petitioner,

—v.—

MARTIN MARIETTA CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1969

No. .....

Ida Phillips,

Petitioner,

—v.—

Martin Marietta Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Ida Phillips respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 26, 1969.

Opinions Below

The opinion of the Court of Appeals is reported at 411 F.2d 1 and is reprinted in the Appendix. The Denial of rehearing and accompanying dissent of Chief Judge Brown and Judges Ainsworth and Simpson, not yet reported, and the opinion of the District Court for the Middle District of Florida, also not reported, appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered May 26, 1969. A timely request for rehearing, initiated by a member of the Court, was denied October 13, 1969, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the sex discrimination prohibition of § 703, Civil Rights Act of 1964, is violated by refusal to hire all women with preschool children while hiring men of the same class, where the distinction does not purport to be based on a bona fide occupational qualification.

Statutory Provisions Involved

United States Code, Title 42

§2000e-2(a) [§703(a) of Civil Rights Act of 1964]

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of

such individual's race, color, religion, sex, or national origin.

§2000e-2(e) [§703(e) of Civil Rights Act of 1964]

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Statement of the Case

Ida Phillips, the petitioner, applied for an Assembly-Trainee job with Martin Marietta Corporation, the respondent (hereinafter "Martin"). She had a high school background, the only specified prerequisite to the job. However, Martin refused to accept her application, stating that it did not hire women with "pre-school age children" for this job, although men with pre-school children were hired. Moreover, it does not appear that respondent hires women whose pre-school children may be cared for, for example, by a grandmother or older sibling or day care center. Nor, does respondent apparently even inquire concerning whether a male applicant for employment is a widower with a pre-school child or whether the wife of a married employee with a child is employed or otherwise not in full-time charge of the child.

Mrs. Phillips complained that this constituted unlawful sex discrimination under the Civil Rights Act of 1964. The District Court struck her allegations regarding the pre-school children rule as "irrelevant and immaterial" and ruled for Martin on summary judgment when she could introduce no other evidence of sex discrimination. The Court of Appeals affirmed, holding that this discrimination "based on a two-pronged qualification, i.e., a woman with pre-school age children" was not discrimination because of sex within the meaning of the Act.

Reasons for Granting the Writ

The decision below is based upon an illogical interpretation of the Civil Rights Act of 1964 which impairs its effectiveness and which conflicts in principle with other Court of Appeals decisions. Although the case involves only dis-

crimination against women, its effect upon the substantial number of Negro women in the work force makes the decision particularly important with respect to the racial discrimination provisions of the law. Moreover, the principle established below threatens the effectiveness of the entire Federal equal employment law. In the words of Chief Judge Brown (dissenting), if the "sex-plus" rule of this case stands, "the Act is dead." Appendix, at 18a. It is important, moreover, that this issue be promptly resolved, to protect the credibility of the regulations of the Equal Employment Opportunity Commission which are directly contradicted by the decision below.

I.

The Decision Below Is Based Upon an Erroneous Interpretation of Title VII of the Civil Rights Act of 1964 Which Impairs its Effectiveness and Conflicts in Principle With Other Court of Appeals Decisions.

The prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 does not prohibit only flat refusals to hire women. It is unlawful for an employer "otherwise to discriminate" against women. See §703(a), 42 U.S.C. §2000e-2(a). The District Court attempted to justify its decision by stating that:

> "The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies." [1]

While it may be argued that because a woman might have special responsibilities toward her children she may be treated differently in hiring, this fails to take account of

[1] See Appendix, p. 2a, *infra*.

the situation where peculiar responsibilities do not in fact affect job performance. Martin will not hire women with pre-school children if there is a grandmother or older sister at home to care for them, or if a day care center fulfills that purpose. Nor will it hire women with pre-school children even if their husbands are at home unemployed (as often occurs because of lay-off or disability).[2] Martin will apparently hire widowers with pre-school children, but not widows. It will apparently hire men with pre-school children even if their wives are already employed elsewhere. The Martin rule makes no attempt to assess family responsibility in any objective way. The use of such stereotypes is, we submit, the essence of unlawful discrimination prohibited by Title VII.

The reasoning of the District Court would have some merit only if there were differing responsibilities *which affected the job performance of women workers.* Martin might then take account of job performance needs in two ways:

1. The Act enables an employer to impose a different hiring standard for women where the standard is shown to be a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business" (sometimes referred to as BFOQ) under section 703(e), 42 U.S.C. §2000e-2(e). See *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969).

2. Where a BFOQ cannot be established, there is another lawful way that an employer can take account of family responsibilities. This is through use of a neutral, not sex based, rule regarding such responsi-

[2] Seven percent of working women have husbands who cannot work. See no. 9, *infra*.

bilities. For example, if an employer can show that the family responsibilities of a spouse who is the sole caretaker of children makes such a person an unreliable employee, the employer may consider a general hiring rule that bars jobs to all spouses who are sole caretakers—including widowers as well as widows, and taking into account child care arrangements. This would be neutral and would deal with the specific problem which concerned the employer.[3] Only the slightest change in employee hiring questionnaires would be necessary.

However, Martin has not attempted use of either provision. Martin did not urge a BFOQ defense or even claim that mothers of pre-school children are poor performers on the job.[4] Nor has Martin attempted to apply a neutral standard in this case.

Title VII prohibits double standards, i.e., any practice which unequally restricts the job opportunities of women or which imposes a burden on women not equally imposed on men. See *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Equal Employment Opportunity Commission Sex Discrimination Guidelines*, 29 C.F.R. §§ 1604.2,

[3] Even a neutral rule should be supported by evidence of business need to prevent its use as a device to discriminate against women. See *Local 53, Heat & Frost Insulators Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); Cooper and Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L.Rev. 1598, 1669-73 (1969).

[4] It is doubtful that Martin could establish a BFOQ defense in this case. The BFOQ exception should be read with a narrow scope to prevent it from violating the law against sex discrimination. See 110 Cong. Rec. 7213 (1964); H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963); Equal Employment Opportunity Commission, Sex Discrimination Guidelines, 29 C.F.R. §1604.1(a) (1968). The point, here, however, is that Martin has not even claimed that the defense is applicable.

1604.3; *cf. Local 53, Heat & Frost Insulators Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969) (race discrimination); *Papermakers Local 189* v. *United States*, 416 F.2d 980 (5th Cir. 1969) (race discrimination); *United States* v. *Sheet Metal Workers, Local 36*, 416 F.2d 123 (8th Cir. 1969) (race discrimination). The practice challenged in this case is a patent violation of this law.

The Court of Appeals justified its decision somewhat differently from the District Court. It reasoned that Mrs. Phillips had not been excluded because of sex but rather because of "sex plus," a two-pronged test: (1) being female and (2) having pre-school children, which coalesced in her case, and that such two-pronged tests did not constitute unlawful discrimination.[5] However, this would make sense only if the law were limited to flat refusals to hire women. Since the law also prohibits extra burdens on women, it should be clear that "sex plus" rules are unlawful. Any rule having sex as one of its factors clearly makes it more difficult for women to obtain jobs than men.[6] The Commission's Guidelines and its rulings make clear that "sex plus" is a violation of Title VII. See *Sex Discrimination Guide-*

[5] See Appendix pp. 9a-10a, *infra*.

[6] The Court of Appeals also relied on evidence that Martin had hired a high percentage of female Assembly-Trainees (75-80%). But, of course, no specific percentage of female employees can per se prove no discrimination. We do not claim that Martin discriminated against all women, but only that it discriminated against a class of women. There are dozens of reasons why a high percentage of women might be employed in spite of the fact that an employer is discriminating against one class of women. For example, the job might be one which appeals to women or one for which women tend to be more qualified. Thus no particular conclusion regarding discrimination can be drawn from the high percentage of females in the position. The only relevant point is that the percentage presumably would and should have been even higher had Martin not applied its discriminatory pre-school children rule which screened out a large group of women from consideration.

lines, 29 C.F.R. § 1604.3; Gen. Counsel Opinion Letter, Sept. 9, 1965, in CCH Empl. Prac. Guide ¶ 1219.29. The Commission filed a brief as *amicus curiae* in this case in the Court of Appeals urging reversal of the District Court decision and filed a supplementary amicus brief supporting a rehearing in the Court of Appeals.

The Court of Appeals' rejection of the Commission's position is inconsistent with established principles calling for deference to the contemporaneous interpretations of an agency charged with enforcement of a complex law. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This principle has unusual importance in the case of the Equal Employment Opportunity Commission. *Cox* v. *United States Gypsum Co.*, 284 F.Supp. 74, 78 (N.D. Ind. 1968); *International Chem. Workers Union* v. *Planters Mfg. Co.*, 259 F.Supp. 365, 366-67 (S.D. Miss. 1966). As an agency with no coercive enforcement powers, the Commission is uniquely dependent on credibility and persuasion in accomplishing its goals.

II.

The Principle Established by the Court of Appeals Decision Threatens the Effectiveness of the Entire Federal Fair Employment Law.

In dissenting from denial of rehearing, Chief Judge Brown, joined by Judges Ainsworth and Simpson, warned:

> "If 'sex plus' stands, the Act is dead."[7]

It is not difficult to see why. Under the Court of Appeals reading, an employer would be free to impose extra educational requirements on women not imposed on men, to require women to pass special tests not given to men, and

[7] See Appendix, p. 18a, *infra*. The rehearing request was brought on *sua sponte* by members of the court.

to meet an infinite variety of other extra standards from which men would be exempted. All of this could be justified on the ground that the discrimination was not against women as such, but rather only against those women who did not meet the special standard, and that this is "sex-plus." Moreover, if "sex plus" is not sex discrimination, then it is difficult to understand why "race-plus" is not exempted from the race discrimination prohibition in the Act. Thus the "sex plus" rule in this case sows the seeds for future discrimination against black workers through making them meet extra standards not imposed on whites.

Even if the "sex plus" rule is not expanded, in its narrow application to mothers of pre-school children it will deal a serious blow to the objectives of Title VII. If the law against sex discrimination means anything it should protect employment opportunities for those groups of women who most need jobs because of economic necessity. Working mothers of pre-schoolers are such a group. Twenty-three per cent of mothers with at least one child under six work, a total of 3.6 million mothers.[8] Studies show that, as compared to women with older children or no children, these mothers of pre-school children were much more likely to have gone to work because of pressing need.[9] Forty-eight percent of pre-school mothers work because of financial necessity and 8% because their husbands are unable to work.[10] Frequently, these women are a key or only source of income for their families. Sixty-eight percent of working women do not have husbands present in

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[8] U.S. Dept. of Labor, 1965 Handbook on Women Workers, Bull. 290, at 2, 42.

[9] Rosenfeld and Perrella, Why Women Start and Stop Working: A Study in Mobility, Monthly Labor Review, Sept. 1965, at 1077-79, Table 1.

[10] *Ibid.*

the household and two-thirds of these women are raising children in poverty.[11]

Moreover, a barrier to jobs for mothers of pre-schoolers is also offensive to the anti-race discrimination purposes of Title VII. This rule tends to harm non-white mothers more than white mothers.

> "[There is] no tendency for blacks in child bearing ages to retire even temporarily from the labor force. This situation is explained not only by the high incidence of poverty in the Negro community and the economic weakness of Negro males, but also by the large proportion of fatherless families." [12]

As of 1960, thirty-one per cent of non-white married women with children under six were working, as compared with only eighteen per cent of white women in the same category.[13]

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[11] U.S. Dept. of Labor, 1965 Handbook on Women Workers, Bull. 290, at 36.

[12] Ross and Hill, eds., Employment, Race and Poverty, 23 (1967).

[13] Peterson, Working Women, 93 Daedalus 671, 684 (1964).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IDA PHILLIPS,

Plantiff,

vs.

THE MARTIN MARIETTA CORPORATION,

Defendant.

RULING ON MOTION FOR SUMMARY JUDGMENT

This cause came on before the Court for hearing July 8, 1968, on the motion of the defendant, MARTIN MARIETTA CORPORATION, for summary judgment. The complaint as originally filed alleged that the plaintiff was discriminated against because of an alleged policy of the defendant not to hire women with pre-school age children. In an order entered February 26, 1968, this Court ruled that the discrimination raised by that allegation was not the sort of discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000(e) et seq., and that the allegation raising discrimination based on the fact that the plaintiff had pre-school age children should be stricken. The case proceeded on the basis of alleged discrimination based on the plaintiff's sex alone.

In support of its motion for summary judgment, the defendant has filed affidavits and answers to interrogatories

showing that the defendant has hired 479 women for the same job for which the plaintiff sought to apply during the relevant period of time; that 70-75% of the applicants for that position were women; that 75-80% of the employees holding that position were women, and that there is no basis in this record to support a finding that the defendant discriminated against this plaintiff because she is a woman.

The plaintiff maintains that a response to a request for admission filed herein June 26, 1968, would be sufficient to withstand defendant's motion for summary judgment. That request seeks an admission from the defendant "(t)hat the Martin Marietta Corporation now employs males with pre-school age children in the position of Assembly Trainees?" Although the time for objecting or responding to that request for admission has not expired at this time, the Court, for purposes of the motion for summary judgment accepts that request for admission as admitted, and finds that the defendant does employ males with pre-school age children in the position of Assembly Trainee. It is, however, the opinion of the Court that such fact was irrelevant and immaterial to the issue before the Court. The responsibilities of men and women with small children are not the same, and employers are entitled to recognize these different responsibilities in establishing hiring policies.

The plantiff having submitted no affidavits tending to show that the defendant discriminated against the plaintiff because the plaintiff is a woman, it is the opinion of the Court that there is no genuine dispute of material fact and that the defendant is entitled to summary judgment as a matter of law. It is, therefore,

ORDERED and ADJUDGED that the motion of the defendant, Martin Marietta Corporation, for summary judgment be

and is hereby granted; judgment in accordance with this opinion will be entered separately.

DONE and ORDERED in Chambers at Orlando, Florida, in this 8th day of July, 1968.

/s/ GEORGE C. YOUNG
United States District Judge

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Opinion of the United States Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,

Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

(May 26, 1969)

Before

GEWIN, McGOWAN* and MORGAN,

Circuit Judges.

MORGAN, Circuit Judge: The present action is before us on an appeal from the granting of a motion for summary judgment by the District Court. The original complaint under Section 706 (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000-5 (e), alleged that appellee Martin Marietta Corporation had violated Section 703, 42 U.S.C. § 2000e-2 when it wrongfully denied appellant Phillips employment

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* Judge Carl McGowan of the District of Columbia Circuit, sitting by designation.

because of sex. An ancillary issue raised concerns the propriety of the District Court's allowing the appeal in forma pauperis conditioned on appellant Phillips' reimbursing the United States in the event of an unsuccessful appeal.

Ida Phillips, the appellant, submitted an application for employment with the appellee, Martin Marietta Corporation, for the position of Assembly Trainee pursuant to an advertisement in a local newspaper. When Mrs. Phillips submitted her application in an effort to gain employment, an employee of Martin Marietta Corporation indicated that female applicants with "pre-school age children" were not being considered for employment in the position of Assembly Trainee. However, males with "pre-school age children" were being considered. A charge was thereafter filed with the Equal Employment Opportunity Commission alleging that plaintiff-appellant's rights under Title VII of the Civil Rights Act of 1964[1] had been violated. The Commission found reasonable cause to believe that defendant Martin Marietta Corporation had discriminated on the basis of sex, and plaintiff filed a class suit in the District Court.

The District Court granted a motion to strike that portion of the complaint which alleged that discrimination against women with pre-school age children violated the statute, and it refused to permit the case to proceed as a class action. The complaint was not dismissed, however, and it was left open to plaintiff to submit evidence to prove her general allegation that she had been discriminated against because of her sex.

Defendant then moved for summary judgment, supported by an uncontroverted showing that, while 70 to 75 percent

[1] 42 U.S.C. §2000e, et seq.

of those who applied for this position were women; 75 to 80 percent of those holding the positions were women. Defendant claimed that this established that there was no discrimination against women in general, or against plaintiff in particular. The Court granted the motion on the ground that there were no material issues of fact which would support a conclusion of discrimination on the basis of sex.

The primal issue presented for consideration is whether the refusal to employ women with pre-school age children is an apparent violation of the 1964 Civil Rights Act's proscription of discrimination based on "sex". The pertinent portion of the Act, 42 U.S.C. 2000e-2, reads as follows:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex or national origin;

The defendants do not choose to rely on the "bona fide occupational qualification" section of the Act,[2] but, instead, defend on the premise that their established standard of not

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[2] 42 U.S.C. §2000e-2(e):

Unlawful employment practices—Employer practices. Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

(e) Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual,

hiring women with pre-school age children is not per se discrimination on the basis of "sex".

The question that confronts us is a novel one upon which the courts have been asked to rule only on a few occasions. However, none of the cases reviewed by this Court deal with the specific issue presented here. In the case of *Cooper v. Delta Airlines, Inc.*, 274 F. Supp. 781 (E.D. La., 1967), appeal dismissed, No. 25,698, 5 Cir., Sept. 1968 the District Court held that an airlines hostess who is fired because she was married has not been discriminated against on the basis of sex. However, Delta did not consider men for the positions in question, and therefore, unlike the case *sub judice*, the discrimination was between different categories of the same sex. Recently the Fifth Circuit was called upon to review a problem of a kindred nature in *Weeks v. Southern Bell Telephone & Telegraph Co.*, No. 25,725 (5 Cir.,

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for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Mar. 4, 1969). However, that case is inapposite to the case at bar in that the defendant in *Weeks*, supra, established its defense on the "bona fide occupational qualification", rather than relying solely on 42 U.S.C. 2000e-2a (1).

The position taken by the Equal Employment Opportunity Commission is that where an otherwise valid criterion is applied solely to one sex, then it automatically becomes a per se violation of the Act. In its argument, the defendant outlines the proposal that before a criterion which is not forbidden can be said to violate the Act, the court must be presented some evidence on which it can make a determination that women as a group were treated unfavorably, or that the applicant herself was singled out because she was a woman. However, neither litigant is able to present substantive support for its theory. Both cite selected sections from the congressional history of the bill; however, a perusal of the record in Congress will reveal that the word "sex" was added to the bill only at the last moment and no helpful discussion is present from which to glean the intent of Congress. To buttress its position, the Commission cites to its own regulations; however, it is well established administrative law that the construction put on a statute by an agency charged with administering it is entitled to deference by the courts, but the courts are the final authorities on issues of statutory construction. *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968).

We are of the opinion that the words of the statute are the best source from which to derive the proper construction. The statute proscribes discrimination based on an individual's race, color, religion, sex, or national origin. A per se violation of the Act can only be discrimination based solely on one of the categories i.e. in the case of sex, women vis-a-vis men. When another criterion of employment is

added to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin. It becomes the function of the courts to study the conditioning of employment on one of the elements outlined in the statute coupled with the additional requirement, and to determine if any individual or group is being denied work due to his race, color, religion, sex or national origin. As was acknowledged in *Cooper*, supra, 42 U.S.C. 2000e-2 (a) does not prohibit discrimination on any classification except those named within the Act itself.[3] Therefore, once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires. However, it is the duty of the employer to produce information to substantiate his defense of non-discrimination. It is emphasized that this issue does not concern the bona fide occupational qualification under which discrimination is admitted by the employer while alleging that such discrimination was justified.

As to the case *sub judice*, as assembly trainee, among other disqualifications, cannot be a woman with pre-school age children. The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age

[3] "The discrimination lies in the fact that the plaintiff is married—and the law does not prevent discrimination against married people in favor of the single ones." *Cooper* v. *Delta Air Lines, Inc.*, 274 F. Supp. 781 (1967).

children. It is the coalescence of these two elements that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm.

Decision in this case ultimately turns, of course, upon the reach of the Congressional intention underlying the statutory prohibition of discrimination in employment based upon sex. Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in a treatment under the "bona fide employment disqualification" provision of the statute.

The Commission, however, in its appearance before us has rejected this possible reading of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon "sex" as Congress intended that term to be understood, we have no hesitation in choosing the latter. The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.

Opinion of the United States Court of Appeals

In conclusion, we address ourselves to the condition attached to the *in forma pauperis* grant. Once the District Court has determined that the application to proceed in forma pauperis is meritorious, the discretion of the Court is closed and the application should be granted. Title 28, U.S.C.A. 1915; *Williford* v. *People of State of California*, 329 F. 2d 47 (9 Cir., 1964). The condition that appellant Phillips must reimburse the United States in the event of an unsuccessful appeal is hereby removed from the grant to proceed in forma pauperis.

AFFIRMED.

Per Curiam Opinion Denying Rehearing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26825

IDA PHILLIPS,
Plaintiff-Appellant,

versus

MARTIN MARIETTA CORPORATION,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

(October 13, 1969)

Before

GEWIN, McGOWAN* and MORGAN,
Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), Rehearing En Banc is also DENIED.

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* From the D.C. Circuit, sitting by designation.

Per Curiam Opinion Denying Rehearing

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, and CARSWELL, Circuit Judges.

BROWN, Chief Judge, with whom AINSWORTH and SIMPSON, Circuit Judges, join, dissenting:

I dissent from the Court's failure to grant rehearing en banc.[1]

I.

Without regard to the intrinsic question of the correctness of the Court's decision and opinion, this is one of those cases within the spirit of FRAP 35 and 28 USCA § 46 which deserves consideration by the full Court.

As the records of this Court reflect, we have within the very recent months had to deal extensively with Title VII civil rights cases concerning discrimination in employment on account of race, color, sex and religion.[2] Court decisions on critical standards are of unusual importance. This is

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[1] Presumably because it was *amicus* only and not a party, the Government did not seek either rehearing or rehearing en banc. For understandable reasons the private plaintiff, Ida Phillips, who has the awesome role of private Attorney General without benefit of portfolio, or more important, an adequate purse, presumably felt that she had fulfilled her duty when the Court ruled. Subsequently, on a poll being requested, FRAP 35; 5th Circuit Rule 12, the Government filed a strong brief attacking the Court's decision. Likewise, the private plaintiff's counsel filed a persuasive brief. This merely emphasizes that it has been members of this Court, not the parties, who have raised questions about the Court's decision. This is in keeping with 28 USCA §46 and FRAP 35.

[2] These include the following and those cited therein:
Jenkins v. United States Gas Corp., 5 Cir., 1968, 400 F.2d 28; Oatis v. Crown Zellerbach Corp., 5 Cir., 1968, 398 F.2d 496; Pettway v. American Cast Iron Pipe Co., 5 Cir., 1969, 411 F.2d 998; Local 189, United Papermakers and Paperworkers, 5 Cir., 1969, —— F.2d —— [No. 25956, July 28, 1969];

so because, except for preliminary administrative efforts at conciliation and the rare pattern or practice suit by the United States,[2] effectuation of Congressional policies is largely committed to the hands of individual workers who take on the mantle of a private attorney general[4] to vindicate, not individual, but public rights.

This makes our role crucial. Within the proper limits of the case-and-controversy approach we should lay down standards not only for Trial Courts, but hopefully also for the guidance of administrative agents in the field, as well as employers, employees, and their representatives.

The full Court should look at the issue here posed. And now in the light of the standard erected—sex if coupled with another factor is acceptable—it is imperative that the full Court look at it.

II.

Equally important, the full Court should look to correct what, in my view, is a palpably wrong standard.

The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may.[5]

United States v. Hayes Internat'l. Corp., 5 Cir., 1969, —— F.2d —— [No. 26809, August 19, 1969]; Weeks v. Southern Bell Tel. & Tel. Co., 5 Cir., 1969, 408 F.2d 228; Dent v. St. Louis-S.F. Ry., 5 Cir., 1969, 406 F.2d 399.

Also pending before a panel of this Court are two analogous cases under §17 of the Fair Labor Standards Act, 29 USCA §§201 *et seq.*, involving equality of compensation to women: No. 26960, Schultz v. First Victoria Nat'l. Bank; and No. 26971, Shultz v. American Bank of Commerce.

[2] See §707(a), 42 USCA §2000e-6 (a).

[4] See Pettway v. American Cast Iron Pipe Co., note 2, *supra*, 411 F.2d at 1005; Jenkins v. United Gas Corp., note 2, *supra*, 400 F.2d at 32-33.

[5] The man would qualify even though as widower or divorcee he had sole custody of and responsibility for pre-school children.

The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplyfy the simplest biology, must then be a woman.

It is the fact of the person being a mother—*i.e.* a woman—not the age of the children, which denies employment opportunity to a woman which is open to a man.

How the Court strayed from that simple proposition is not easy to divine. Not a little of the reason appears to be a feeling that the Court in interpreting § 703(a)(1), 42 USCA § 2000e-2(a)(1), prohibiting sex discrimination,[6] is bound to accept the contention of one of the parties, rather than pick and choose, drawing a middle line, or for that matter reaching independently an interpretation sponsored by no one. Thus, after noting that in the Trial Court and here the Employer did not "choose to rely on the 'bona fide occupational qualification' section of the Act,[7] but, instead, defended on the premise that their

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[6] Section 703(a)(1) reads as follows:

"(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 USCA §2000-e2(a)(1).

[7] Section 703 (e) states:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to clas-

established standard of not hiring women with pre-school age children is not per se discrimination on the basis of 'sex'" (*Phillips* v. *Martin Marietta Corp.*, 5 Cir., 1969, 411 F.2d 1, 2-3), the Court virtually acknowledges the patent discrimination based on biology. The Court states: "Where an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with pre-school age children, on the other, there is arguably an apparent discrimination founded upon sex. It is possible that the Congressional scheme for the handling of a situation of this kind was to give the employer an opportunity to justify this seeming difference in treatment under the 'bona fide employment disqualification' provision of the statute." 411 F.2d at 4.

But in what immediately followed the Court then does a remarkable thing. Referring to EEOC (appearing only as *amicus*), it states: "The Commission, however, in its appearance before us has rejected this possible reading[8] of the statute. It has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude absolutely any

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sify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. * * *"

42 USCA §2000e-2(e).

[8] Such a reading is certainly not rejected by EEOC on this rehearing. The supplemental brief (pp. 9-10) recognizes the employer's right to claim and prove the §703(e) "business necessity" exemption. (See note 7, *supra*).

consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children, and to require that an employer treat the two exactly alike in the administration of its general hiring policies. If this is the only permissible view of Congressional intention available to us, * * * we have no hesitation in choosing the latter." 411 F.2d at 4.

It is this self-imposed interpretive straightjacket which, I believe, leads the Court to the extremes of "either/or" outright per se violation with no defense or virtual complete immunity from the Act's prohibitions. This it does through its test of "sex plus": "[1] A per se violation of the Act can only be discrimination based solely on one of the categories *i.e.* in the case of sex; women vis-a-vis men. [2] When *another* criterion of employment *is added* to one of the classifications listed in the Act, there is no longer apparent discrimination based solely on race, color, religion, sex, or national origin." [9] 411 F.2d at 3-4 (Emphasis supplied).

Reducing it to this record the Court characterizes the admitted discrimination in this way. "The discrimination was based on a *two-pronged* qualification, *i.e.*, a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the *coalescence* of these *two elements* that denied her the position she desired. In view of the above, we are convinced that the judgment of the District Court was proper, and we therefore affirm." 411 F.2d at 4 (Emphasis supplied).

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[9] By supplemental brief (p. 4, n. 1) EEOC agrees with [1] on "per se" violations.

If "sex plus" stands, the Act is dead.[10] This follows from the Court's repeated declaration[11] that the employer is not forbidden to discriminate as to non-statutory factors. Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers. This could include, for example, all sorts of physical characteristics, such as minimum weight (175 lbs.), minimum shoulder width, minimum biceps measurement, minimum lifting capacity (100 lbs.), and the like. Others could include minimum educational requirements (minimum high school, junior college), intelligence tests, aptitude tests, etc. And it bears repeating that on the Court's reading, one of these would constitute a complete defense to a charge of § 703(a) (1) violation *without* putting on the employer the burden of proving "business justification" under § 703(e) (note 7, *supra*).

In addition to the intrinsic unsoundness of the "sex plus" standard, the legislative history refutes the idea that Congress for even a moment meant to allow "non-business justified" discrimination against women on the ground that they were mothers or mothers of pre-school children. On the contrary, mothers, working mothers, and working mothers of pre-school children were the specific objectives of governmental solicitude.

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[10] Of course the "plus" could not be one of the other statutory categories of race, religion, national origin, etc.

[11] See, *e.g.*, "As was acknowledged in *Cooper, supra*, 42 USC 2000e-2(a) does not prohibit discrimination on any classification except those named within the Act itself. Therefore, once the employer has proved that he does not discriminate against the protected groups, he is free thereafter to operate his business as he determines, hiring and dismissing other groups for any reason he desires." 411 F.2d at 4.

In the first place, working mothers constitute a large class[12] posing much discussed problems of economics and sociology. And with this large class and the known practice of using baby-sitters or child care centers, neither an employer nor a reviewing Court can—absent proof of "business justification" (note 7, *supra*)—assume that a mother of pre-school children will, from parental obligations, be an unreliable, unfit employer.[13]

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[12] Statistics compiled by the Wage and Labor Standards Administration of the United States Department of Labor indicate that working mothers comprise an important and increasing segment of the Nation's labor resources. In the most recent compilation (March 1967), there were 10.6 million working mothers in the labor force with children under 18 years of age. This is an increase of 6 million over 1950 and an increase of 9.1 million over 1940. Of the total of working mothers in March 1967, 38.9% were mothers of children under 6 years of age and 20.7% were mothers with children under 3 years of age. In numerical terms, 4.1 million working mothers had children under 6 and 2.1 million working mothers had children under 3. *Who are the Working Mothers,* United States Department of Labor, Wage and Labor Standards Administration, p. 2-3 (Leaflet 37, 1968).

[13] The brief of EEOC points out:

> "In answering the question: 'What arrangements do working mothers make for child care?', the Department of Labor responded:
>
> 'In February 1965, 47 percent of the children under 6 years of age were looked after in their own homes and thirty percent were cared for in someone else's home, but only 6 percent received group care in day care centers or similar facilities.'
>
> *Who are Working Mothers, supra* [Note 12].

Furthermore, it is the policy of the Administration to encourage unemployed women on public assistance, who have children, to enter the labor market by providing for the establishment of day care centers to enable them to accept offers of employment. On August 8, 1969, President Nixon stated in his address to the Nation on welfare reforms:

> 'As I mentioned previously, greatly expanded day-care center facilities would be provided for the children of welfare mothers

In this and the related legislation on equality of *compensation* for women[14] one of the reasons repeatedly stressed for legislation forbidding sex discrimination was the large proportion of married women and mothers in the working force whose earnings are essential to the economic needs of their families.[15]

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who choose to work. However, these would be day-care centers with a difference. There is no single ideal to which this Administration is more firmly committed than to the enriching of a child's first five years of life, and thus helping lift the poor out of misery, at a time when a lift can help the most. Therefore, these day-care centers would offer more than custodial care; they would also be devoted to the development of vigorous young minds and bodies. As a further dividend, the day-care centers would offer employment to many welfare mothers themselves." *Text of Nixon's Address to the Nation Outlining His Proposals for Welfare Reform*, N. Y. Times, August 9, 1969, at 10, Col. 6."

Brief for EEOC at 11-12.

[14] Equal Pay Act of 1963, 77 Stat. 56, effective June 11, 1964, 29 USCA §206. See pending cases, note 2 *supra*.

[15] Thus, President Kennedy, in signing the Equal Pay Act, summarized the conditions which necessitated such a law, as follows:

"[T]he average women worker earns only 60 percent of the average wage for men * * * Our economy today depends upon women in the labor force. One out of three workers is a woman. Today, there are almost 25 million women employed, and their number is rising faster than the number of men in the labor force. It is extremely important that adequate provision be made for reasonable levels of income to them, for the care of the children * * * and for the protection of the family unit * * * Today one out of five of these working mothers has children under three. Two out of five have children of school age. Among the remainder, about 50 percent have husbands who earn less than $5,000 a year—many of them much less. I believe they bear the heaviest burden of any group in our nation. * * *" [Remarks of the President at signing the Equal Pay Act on June 10, 1963, XXI Cong. Q. No. 24, p. 979 (June 14, 1963).]

At the Senate Hearings, Secretary of Labor Wirtz pointed out:

Congress could hardly have been so incongruous as to legislate sex equality in employment by a statutory structure enabling the employer to deny employment to those who need the work most through the simple expedient of adding to sex a non-statutory factor.[16]

A mother is still a woman. And if she is denied work outright because she is a mother, it is because she is a woman. Congress said that could no longer be done.

"Women's earnings, in many families, are a substantial factor in meeting living costs. *Married women, for example, accounted for over one-half of the total number of women workers in 1962.* Nearly 900,000 working women had husbands who, for various reasons, were not in the labor force, primarily because they were disabled or retired. The proportion of working wives is materially higher among families in the low-income groups." [1963 Senate Hearings, p. 16]

See also Representatives Green (109 Cong. Rec. 9199):

"There are approximately 25 million working women in the labor force today, and we are simply asking, by this legislation, to look at the facts as they face us in 1963, in instances where there is unequal pay. * * * Women are the heads of 4.6 million families in the United States; one-tenth of all the families in this country. Nearly one million working women have husbands who are not employed, mainly because they are disabled or retired. Nearly 6 million working women are single. The proportion of married women who work is materially higher in the low-income families, and, according to the testimony that was presented to the committee, some 7.5 million women workers supplement the income of male wage earners who make less than $3,000 a year. Women's wages average less than two-thirds of the wages paid men."

[16] Too much emphasis cannot be given to the employer's right to claim and prove the §703(e) "business justification" exemption (see note 7, *supra*). This was not done, but on remand it should be open to the employer here.